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In the
Supreme Court of the United States
October Term, 1992

INVENTION SUBMISSION CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Invention Submission Corporation (hereinafter "ISC") submits this Reply in Support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, which Petition was filed on November 2, 1992. ISC seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the United States District Court for the District of Columbia enforcing the Civil Investigative Demands (i.e., administrative subpoenas) of the Federal Trade Commission (hereinafter "Commission").

ARGUMENT

I. Contrary To The Federal Trade Commission's Assertions, The District of Columbia Circuit Departed From Precedent By Not Requiring The Commission To Make Any Showing As To The Relevance Of Material Sought By An Administrative Subpoena, And By Imposing The Burden Of Showing Irrelevance On Petitioner.

For purposes of clarifying the issues presented to the Court by the instant case, it must be noted that the Commission's statements

in its Brief in Opposition to ISC's Petition for Certiorari regarding the history of this case are inaccurate in several respects. Commissioner Terry Calvani, in his Ruling on petitioner's Petition to Limit or Quash the Commission's administrative subpoenas, ruled that the financial information sought by the Commission was relevant "as evidence of a *possible profit motive* for the alleged misrepresentations, which bears on ISC's culpability for them". [Emphasis added] App. D to Petition, p. 13d. (Appendices to the Petition are hereinafter referred to as "App.")

Further, the financial information sought from ISC in the administrative subpoenas here at issue consisted of *only* ISC's balance sheets, income statements and gross sales. See Ruling of Commissioner Calvani, App. D. at 13d, n. 18. The more detailed financial information discussed by the Commission, in their Brief in Opposition at p. 9, is not here at issue, as the Commission admits. The Commission sought this information in *later* administrative subpoenas, which were never considered by the United States Court of Appeals for the District of Columbia Circuit, whose decision the petitioner now asks this Court to review. *Id*, n. 4.[1] Accordingly, the only question now before the Court, relative to ISC's financial information, concerns the

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[1] Petitioner contends that the Commission's reference to later administrative subpoenas not here at issue is misleading as to what is at issue in this case, and as to the bases for the Commission's relevancy arguments. Given that specific breakdowns of costs and expenses of ISC are not here at issue, the Commission's argument on this subject at p. 9 has nothing to do with any issue now before the Court. For the same reason, *Federal Trade Comm'n v. Dupont Model Management, Inc.*, 1992-1 Trade Cas. (CCH) ¶69,694 (E.D. Pa. 1992), in which financial information containing a breakdown of expenses proved that the company provided few or no services to clients, is inapposite. Further, the Commission well knows based on almost five years of investigation of ISC, that ISC has a staff which expends substantial effort in providing invention services to its clients; that ISC has an extensive computerized Data Bank of companies which have signed confidentiality agreements, and data bases of other companies, to which it sends clients' inventions; that ISC has an art department and a research department; and that ISC sends out extensive mailings to companies on behalf of its clients. ISC therefore cannot be compared to Dupont Model Management, which provided few or no services to its clients.

relevance of the general financial information initially subpoenaed by the Commission, and whether the District of Columbia Circuit applied the proper standard in determining this information to be relevant.

The United States District Court for the District of Columbia did not consider specifically whether this financial information sought by the Commission was relevant to its investigation, as set forth in the Commission's resolution. Instead, the District Court held only that "[m]easured against this general statement of the purpose of the investigation [in the Commission's resolution], the court is satisfied that all of FTC's unmet information demands are relevant." App. C at 5c. For the Commission's resolution, see *id.* at 4c.

The District of Columbia Circuit considered the relevance of financial information based on the record made before the district court, and considered the only rationale for relevance proffered by the Commission: the "profit motive" rationale.[2] The District of Columbia Circuit termed this rationale "puzzling". App. A at 7a. Nonetheless, the District of Columbia Circuit held that the financial information sought from ISC was relevant, even though the Commission's only rationale for relevance had been dismissed in this fashion by the District of Columbia Circuit. Essentially, the

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[2] The Commission states in its Brief in Opposition that it never "equated profitability alone with deceptive business practices". Brief in Opposition at p. 10. However, the Commission's contention that "lucrative returns may evidence a motive for encouraging or tolerating misrepresentations" (*Id.*) cannot be separated from the idea that profits somehow indicate misrepresentation. Given that all business in the United States operates in order to make a profit, the Commission's contention that profit indicates misrepresentation is "puzzling" indeed.

The District of Columbia Circuit's rationale that the financial information may assist the Commission in allocating its resources is plainly insupportable, given that the Commission's resolution authorizes only an investigation of ISC and its President. See, in this regard, the Petition at pp. 21-22. In addition, the idea that financial information will assist in the allocation of investigative resources again rests on the "puzzling" premise that profits somehow indicate misrepresentations.

Circuit Court held that the financial information sought by the Commission was relevant *without* requiring the Commission to proffer any rationale for relevancy whatsoever.[3] At the same time, the District of Columbia Circuit held that ". . . it is essentially the respondent's burden to show that the information [sought by an administrative subpoena] is irrelevant." *Id.* This shifting of the burden of showing irrelevance to the respondent, while requiring the agency subpoenaing information to make *no showing whatsoever*, is contrary to precedent. Rather than following the standards set by prior cases, as the Commission has argued, the District of Columbia Circuit has completely abrogated the relevancy limitation on administrative subpoenas.

As stated in the Petition for Certiorari, since the 1940's, when the courts first recognized the power of an administrative agency to issue a subpoena for investigative purposes, a relevancy limitation on such subpoenas has been recognized. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). In *Oklahoma*

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[3] The cases cited by the Commission in its Brief in Opposition at p. 5, n. 3, are inapposite. In *Securities Exchange Comm'n v. Brigadoon Scotch Distrib. Co., Inc.*, 480 F.2d 1047, 1055 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), the financial information sought by the SEC was held to be relevant to a determination as to whether financial responsibility or anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act were violated. The relevance of financial information to financial investigations under these securities acts bears little relation to the relevance of financial information to an investigation of possible misrepresentations to consumers under the Federal Trade Commission Act. The Commission's descriptions of the holdings in *Federal Trade Comm'n v. American Buyers Network, Inc.*, 1991-2 Trade Cas. (CCH) ¶69,551 at 66443 (D. Colo. 1991) and *Federal Trade Comm'n v.International Diamond Corp.*, No. C-81-29 MISC SAW (N.D. Cal. Jan. 4, 1982) are erroneous. In *American Buyers Network*, financial information was held to be relevant to the question of whether assets were being funnelled from one company to another (which is not at issue in the instant case) and to cross check other *financial* information. In *International Diamond Corp.*, an unpublished case, the court held that financial information is relevant, without stating either *what* information was sought, or *why* it was relevant. These cases are clearly inapposite to the relevancy questions in the instant case.

Press, the Court held that certain limitations on the subpoena power, including the relevancy limitation, were necessary under the Fourth Amendment. *Id.* at 208-209. It is also well recognized that an administrative agency must make a showing of relevancy of the material sought by its subpoena, in order to obtain enforcement. *United States v. Powell*, 379 U.S. 48 (1964). See Petition at pp. 11-18. The cases cited by the Commission regarding relevance of material subpoenaed by administrative agencies are consistent with these holdings.[4] While agencies conducting investigations are often given broad subpoena powers by statute, and the relevancy standards are often lenient, those standards

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[4] For example, in *United States v. Arthur Young and Co.*, 465 U.S. 805 (1984), the IRS was investigating questionable payments made by a company, and sought the company's accounting firm's records. The Court considered relevance under a statute granting access to papers which "may be relevant or material" to a tax investigation. Holding that "relevance" for investigative purposes is much broader than relevance for admissibility at trial, the Court held that tax papers of the accounting firm, which were prepared pursuant to an audit, were relevant under the statute because they might shed light on the company's tax return. In so doing, the Court carefully considered the role of the accounting firm in the company's business, and the connection of the material sought to the tax return. The Court then rejected the respondent's claims of accountant/client privilege and work product immunity. The other cases cited by the Commission which concern relevancy of material subpoenaed by agencies also involve careful application of relevancy standards under the applicable statutes, and a reasoned determination that the material sought is relevant.

Equal Employment Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54 (1984), and *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990), cited by the Commission at pp. 7-8 of their Brief in Opposition, are both inapposite. In *University of Pennsylvania*, the university conceded relevance of the subpoenaed material to the EEOC's investigation of possible employment discrimination in a tenure decision. The issue in this case was whether the university could withhold from the EEOC academic peer review information based on a claimed academic peer review privilege under the First Amendment. The Court refused to recognize such a privilege. In *Shell Oil*, the company contended that the charge of discrimination filed by the EEOC was deficient under the statute and the regulations, which contention the Court rejected. The discussion of relevance in that case is specific to the definition of relevance under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and is dictum.

nonetheless exist. In *Federal Trade Comm'n v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977), the court stated that an administrative agency did not have to state a specific theory of relevancy of subpoenaed material at the investigatory stage. Nevertheless, the court carefully considered the relevance of the material sought in light of the Commission's resolution authorizing compulsory process, and accepted the Commission's rationale for relevancy of certain materials which it sought. The court in *Texaco* did not place the burden of showing irrelevance on respondents, and did relieve the agency of the requirement of showing relevance. *Id.* at 873-874, 876-877, n. 32. In its Brief in Opposition, the Commission attempts to equate the holding in *Texaco* that an agency need not state a specific theory of violation of the law, with the District of Columbia Circuit's holding that, essentially, an agency subpoenaing material need make no showing of relevancy. The two cannot be equated.

The District of Columbia Circuit's decision in the instant case has vitiated the relevancy limitations on administrative subpoenas to the point where, for all practical purposes, they cease to exist. Under this Circuit Court's decision, a business is completely without protection from the "officious intermeddling"[5] of an administrative agency which, exceeding its statutorily authorized investigative powers, attempts to delve into records having nothing to do with its investigation. Accordingly, petitioner requests that the Court grant certiorari.

II. The District of Columbia Circuit's Decision in the Instant Case Conflicts with the Fifth Circuit's Decision in *Federal Trade Comm'n v. Turner*

Contrary to what the Commission has argued at pp. 12-16 of its Brief in Opposition, *Federal Trade Comm'n v. Turner*, 609 F.2d 743 (5th Cir. 1980), has been previously interpreted by the Commission as preventing the Commission from subpoenaing financial information in the context of an investigation of possible

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[5] See *Oklahoma Press, supra*, 327 U.S. at 213.

misrepresentations. In *In re Rome Finance Co.*, File No. 862-3090 (March 25, 1988) (App. F), Commissioner Terry Calvani, the same Commissioner who ruled in the instant case, ruled on a Petition to Quash administrative subpoenas. As in the instant case, the authority to rule on this Petition was delegated to a single Commissioner, under the Commission's rules. See Brief in Opposition at p. 3. Based on *Turner*, Commissioner Calvani ruled that the Commission *cannot* obtain financial information at the investigative stage, but instead can obtain such information only after it has established liability and obtained a judgment. App. F at 3f-4f.[6]

The Commission's statements regarding *Turner*, that it deals only with subpoenas by the Commission seeking information for purposes of determining the feasibility of redress, are therefore contrary to the Commission's prior interpretation of that case in *Rome Finance*. *Turner* holds that the Commission may not subpoena financial information, and the District of Columbia Circuit's decision in the instant case is therefore in conflict with *Turner*. Accordingly, petitioner requests the Court to grant certiorari.

III. The District of Columbia Circuit Erred In Holding That Compliance With The Administrative Subpoenas Would Not Be Unduly Burdensome To ISC, Based On the Commission's Unsupported Assurances, While Providing ISC With No Protection From Undue

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[6] Whether financial information is relevant to the Commission's investigation of proposed mergers of corporations has nothing to do with the instant case. The power of the Commission to obtain information under the sections of the Federal Trade Commission Act empowering it to prevent and investigate unfair consumer practices, 15 U.S.C. §§45(a) and 57b-1, has nothing to do with its power to obtain information under the completely separate antitrust provisions of the Act at 15 U.S.C §1312. Further, there are obviously different relevancy considerations in an antitrust investigation and an investigation of possible misrepresentations to consumers. Antitrust issues have no bearing on the instant case, and the Commission's reference to mergers at p. 15, n. 11 of its Brief in Opposition represents another attempt to obscure the issues in this case.

Burden.

As stated in the Petition for Certiorari, at pp. 25-26, an administrative subpoena must be reasonable in order to comply with the Fourth Amendment. In order to be reasonable, such a subpoena may not be unduly burdensome to the respondent, i.e., compliance with the subpoena may not "threaten[ ] to unduly disrupt or seriously hinder the normal operations of a business". *Texaco*, *supra*, 555 F.2d at 882. ISC contends that providing contact information on customers, advertising media and the companies in the Data Bank to which ISC sends information on clients' inventions, would be unduly burdensome under *Texaco*, as the Commission's unrestricted contacts with these persons and entities would place ISC under a cloud of suspicion, causing them to cease dealing with ISC. The United States District Court for the District of Columbia held that there was no undue burden to ISC under *Texaco*, based on assurances of the Commission as to its intended use of the subpoenaed information. App. C at pp. 7c-8c. The District of Columbia Circuit affirmed that holding. App. A at 7a-8a.

ISC has been required to provide information which it contends will unduly disrupt and seriously hinder the normal operations of its business, without any protection from this undue burden except the unsupported assurances of the staff of the Commission's Boston office.[7] Rather than seeking a protective order restricting the Commission's investigation, which the District Court would have no power to grant, ISC seeks a modification of the administrative subpoenas to provide it with protection against subpoenas which are unreasonable, under the *Texaco* standard and under the Fourth Amendment.[8]

The District of Columbia Circuit held that there is a

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[7] As stated in the Petition for Certiorari at p. 26, n. 9, ISC cannot be certain that the assurances of the staff in the Boston office of the Commission are in any way binding on the Commission.

[8] As to Fourth Amendment limitations on administrative subpoenas, see *Oklahoma Press*, *supra*, 327 U.S. at 208-209, cited in the Petition for Certiorari at pp. 11-12.

presumption of administrative regularity, entitling the Commission to have its assurances taken at face value, and that, therefore, modification of the administrative subpoenas was unnecessary. App. A at 8a-9a. Precedent does not support the proposition that such a general presumption of administrative regularity exists, entitling any government agency to have its unsupported statements taken at face value, even in an adversarial proceeding. Such a presumption of regularity applies only to formal agency proceedings such as rulemaking proceedings, and agency compliance with statutory requirements, and this presumption is limited to those contexts.[9] The unsupported assurances of an

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[9] See, e.g., *Federal Communications Comm'n v. Schreiber*, 381 U.S. 279 (1965) (The district court incorporated confidentiality requirements in its order enforcing the administrative subpoenas, despite agency confidentiality rules, and the circuit court affirmed. The Supreme Court overturned these rulings because the FCC had made a decision on treatment of confidential information, pursuant to confidentiality rules formulated under its statutory rulemaking authority. The Court applied the presumption of administrative regularity to the FCC's decision, made in accordance with its rules, in holding that further protection of confidential information was unnecessary.) See also *Exxon Corp. v. Federal Trade Comm'n*, 665 F.2d 1274 (D.C. Cir. 1981) (An order protecting confidential information was issued by an administrative law judge, in accordance with rules made pursuant to the agency's statutory rulemaking authority. The court held that sufficient protection for confidential information had been provided.) As to *Federal Trade Comm'n v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966 (D.C. Cir. 1980), see the Petition for Certiorari at pp. 27-28.

Insofar as *Federal Trade Comm'n v. Stanley H. Kaplan Educ. Center Ltd.*, 433 F. Supp. 989 (D. Mass. 1977), holds that there is a presumption of administrative regularity which is generally applicable, petitioner contends that the case was wrongly decided, and is unsupported by precedent.

United States v. Chemical Found., Inc., 272 U.S. 1 (1926) is inapposite. This sixty-six year old case has to do with the authority of a presidential appointee to seize and sell German patents during World War I, under the Trading with the Enemy Act of 1917. The presumption of administrative regularity was applied to the actions of this appointee, exercising the presidential war power. Clearly, the same presumption is not applicable here. Further, the validity of this case has been affected by due process decisions of the Court in the intervening sixty-six years. This case and *Kaplan* do not support the proposition that the general presumption of administrative regularity is well-recognized outside the context of agency rules and rulemaking, despite the Commission's

employee of the Commission should not be considered sufficient protection from an undue burden on ISC, given that ISC has a Fourth Amendment right to protection from an unreasonable subpoena. Petitioner therefore requests the Court to grant its Petition for Certiorari.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

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contentions to the contrary at pp. 16-17 of the Brief in Opposition.